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No. 91-1304

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM LAMORTE, AKA BUNKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecutor's comment during closing argument to the effect that the government is too busy to prosecute innocent people should be reversible error *per se*.

2. Whether the prosecutor's comment was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 950 F.2d 80.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. The petition for a writ of certiorari was filed on February 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 846 and 963; and

engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. He was sentenced to 50 years' imprisonment and fined $49,200,000. The court of appeals affirmed. Pet. App. 1-12.

1. Between 1970 and 1985, petitioner headed a large and profitable narcotics organization that imported and distributed nearly 120 tons of marijuana and hashish from Jamaica, Colombia, Morocco, Lebanon, and Thailand. Pet. App. 2-3. At trial, the government presented testimony from several members of the organization, including petitioner's brother Thomas, deck hands who worked on the boats used to transport the narcotics, boat captains, distributors, and suppliers. *Ibid.* Petitioner responded by claiming that the testimony of the government's witnesses was fabricated in response to plea bargains the government granted the witnesses in return for their testimony. *Id.* at 3-4. Thus, petitioner suggested in his closing argument that the government—and more particularly, the Assistant U.S. Attorney in charge of the case—had orchestrated the witnesses' testimony in order to concoct a case against him with the theme that:

> [Petitioner] sits in this courtroom because the government went out and called these people. They brought up [petitioner]'s name, they suggested [petitioner]'s name to these witnesses. These witnesses were not talking about [petitioner] until the government went to them and made deals with them to come in here and talk about [petitioner]. So don't let [the Assistant U.S. Attorney] disavow himself or distance himself from these witnesses, because that's exactly the way all of them walked into this courtroom.

Id. at 4.

In his rebuttal, the prosecutor responded to that argument by offering a detailed review of the testimony of the accomplice witnesses, in which he pointed out, among other things, that different witnesses who had not spoken to one another in years corroborated each other by reporting the same details about various transactions and events. The prosecutor then closed by stating:

> Ask yourselves, why would these witnesses and why would the government seek to frame the defendant? You don't think the government is busy enough prosecuting crimes? You don't think the government is busy enough prosecuting crimes that it has the time to be prosecuting innocent people, going after people arbitrarily? I think I'll go after that guy today?

Pet. App. 4-5. Petitioner objected to the prosecutor's comments, but the district court overruled the objection, the prosecutor moved on to other matters, and petitioner did not request a curative instruction. *Id.* at 5.

2. The court of appeals affirmed (Pet. App. 1-12), rejecting petitioner's claim that the prosecutor's remarks required reversal. *Id.* at 6-8. The court commenced by observing that, "[i]n evaluating whether allegedly improper comments by the prosecutor are grounds for reversal, the fundamental question is whether, if there was misconduct, it caused substantial prejudice to the defendant, thereby depriving him of his right to a fair trial." *Id.* at 6. The court agreed with petitioner that "[t]he prosecutor's statement * * * was improper," *id.* at 7, but nevertheless concluded that "reversal is not warranted here, despite the [district] court's failure to sustain [petitioner's] objection and give a curative instruction, since the

misconduct was *de minimis* in the context of this case." *Ibid.* The court explained:

> "[V]iewed in context, the prosecutor's remarks cannot be read as implying that the prosecutor had access to evidence outside the record." Rather, the statement, coming in direct response to [petitioner's] suggestion that the prosecutor had induced witnesses to invent testimony against [petitioner], is best understood as ridiculing the notion that the government had arbitrarily constructed a massive case against him out of thin air.

Id. at 7-8 (quoting *United States* v. *Young*, 470 U.S. 1, 19 (1985)). The court also found that "the overwhelming evidence of * * * criminality, to which the prosecutor's challenged remarks were addressed, 'eliminates any lingering doubt that the prosecutor's remarks * * * exploited the Government's prestige in the eyes of the jury.' " *Id.* at 8 (quoting *Young*, 470 U.S. at 19). Hence, because "there was virtually no likelihood that absent the questioned statement the jury would have accepted [petitioner's] 'fabrication' defense," the court concluded that "this prosecutorial excess did not deny [petitioner] a fair trial." *Ibid.*

ARGUMENT

1. Petitioner's principal contention (Pet. 5-15) is that a jury argument suggesting "that the Government is too busy to prosecute innocent people" is grounds for automatic reversal, because such an argument "is by its nature not susceptible to refutation by a defendant." Pet. 5. That claim is inconsistent with the settled course of this Court's decisions applying harmless-error analysis in cases involving improper prosecutorial comments.

a. Since its decision in *Chapman* v. *California*, 386 U.S. 18 (1967), this Court consistently has applied harmless-error analysis to a wide range of errors and has recognized that even most constitutional errors can be harmless. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1265 (1991); *Rose* v. *Clark*, 478 U.S. 570, 578-579 (1986); *United States* v. *Lane*, 474 U.S. 438, 445-446 (1986). The Court has applied that rule on several occasions to improper prosecutorial comments. See *Chapman*, 386 U.S. at 20-24 (suggesting that harmless-error analysis would apply in a case involving improper comment on a defendant's exercise of his right not to testify); *United States* v. *Hasting*, 461 U.S. 499, 507-509 (1983) (harmless-error analysis applies to improper comment on the defendant's failure to testify); *United States* v. *Young*, 470 U.S. at 11-12 ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, * * * the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error."); *United States* v. *Robinson*, 485 U.S. 25, 33 n.5 (1988).

Petitioner nevertheless contends (Pet. 5-6) that a rule of automatic reversal is appropriate when, in a close case turning on the credibility of the government witnesses, a prosecutor tells the jury that the government is too busy to prosecute innocent people, and the district court overrules the defendant's objection. Although petitioner purports to be contending for a legal standard of general application, his claim actually reduces to an assertion that the prosecutor's argument was improper (a view shared by the

court of appeals),* coupled with a contention that the argument was necessarily prejudicial on the facts of this case. In that light, the rule for which he contends is not really a rule of automatic reversal, but simply a restatement of the general principle that an error requires reversal if it resulted in prejudice in a particular case.

Petitioner offers no reason to believe that the prosecutor's argument in this case was, by its nature, more prejudicial than the matters at issue in this Court's recent harmless-error cases. See, *e.g.*, *Fulminante*, 111 S. Ct. at 1266 (noting that harmless-error analysis can apply even to errors that could have a "dramatic" or "devastating" effect on a trial). As the *Fulminante* Court explained, the possibility that an error might have a seriously prejudicial effect "simply means that a reviewing court will conclude in such a case that [the error] was not harmless error; it is not a reason for eschewing the harmless error test entirely." *Ibid.*

b. Petitioner errs in suggesting (Pet. 5-6) that the decision of the court of appeals conflicts with the decision of the Third Circuit in *United States* v. *DiLoreto*, 888 F.2d 996 (1989). In that case, after the defendants attacked the credibility of the government's witnesses during closing argument, the prosecutor stated in rebuttal that "[w]e don't put liars on the stand." *Id.* at 998 (emphasis omitted). The Third Circuit drew a distinction between "expressions of personal opinion based on the evidence"—which "cannot serve as grounds for reversal *per se* unless the defendant was prejudiced by the remarks," *id.* at

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* In light of petitioner's assertion in his closing argument that the Assistant United States Attorney had fabricated the case against petitioner, it is questionable whether the remarks were improper at all.

999—and "remarks * * * based on information not adduced at trial, [which] require reversal *per se*," *ibid.* As noted above, the court of appeals concluded that the prosecutor's remarks in this case "cannot be read as implying that the prosecutor had access to evidence outside the record." Pet. App. 7. Thus, whatever the merits of the Third Circuit's conclusion that the remarks at issue in *DiLoreto* required automatic reversal, it is clear that petitioner's conviction would have been subject to harmless-error analysis even in the Third Circuit.

2. Petitioner also appears to contend that the prosecutor's remark was not harmless in this case. Pet. 10-15. The court of appeals correctly rejected that fact-bound contention. As the court of appeals noted, the jury was presented with "overwhelming evidence of [petitioner's] * * * criminality." Pet. App. 8. Several of the witnesses corroborated one another with respect to important parts of their stories, *id.* at 4, and the government corroborated significant parts of the witnesses' testimony by documentary evidence and photographs, see Gov't C.A. Br. 3-4, 27. The court of appeals properly held that the prosecutor's remark was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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